IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

MFA.No. 774 of 2002(A)

WCC.67/1998 of W.C.C.,KOTTAYAM
.....

APPELLANT: FIRST OPPOSITE PARTY

VALSALA THOMAS, THAMARA RUBBER PRODUCTS,
M.L.ROAD, KODIMATHA KARA,
CHANTHAKADAVU BHAGOM, KOTTAYAM.

BY ADV. SRI.BECHU KURIAN THOMAS
SRI.PRAKASH PUTHIADAM
SRI.ROSHIN IPE JOSEPH

RESPONDENTS: APPLICANTS & SECOND OPPOSITE PARTY
----

1. VELAYUDHAN NAIR, KOTTAMALA COLONY,
AYMANAM P.O., AYMANAM VILLAGE,
KOTTAYAM.

2. S.UMAYAMMA, KOTTAMALA COLONY,
AYMANAM P.O., AYMANAM VILLAGE, KOTTAYAM.

3. NATIONAL INSURANCE COMPANY LTD.,
BRANCH OFFICE, P.B.NO.70, M.C.ROAD,
CHENGANACHERRY, KOTTAYAM.

ADDL. R4 IMPLEADED

4. STATE OF KERALA, REP.BY
COMMISSIONER WORKMEN'S COMPENSATION, KERALA.

ADDL. R4 IS IMPLEADED VIDE ORDER DT. 6.4.04 ON IA. 1106/2004.

BY ADV. SMT.KOCHUMOL KODUVATH – R1 & R2
SRI.KARJET KODUVATH
SRI.RAJAN P.KALIYATH - R3

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 07/11/2007, ALONG WITH MFA NO. 875 OF 2002 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.F.A. NO.774/2002

ORDER ON CMP. NO.4798/2002 IN MFA. NO.774/2002

DISMISSED

07.11.2007 **SD/- J.B.KOSHY, JUDGE**

SD/- K.HEMA, JUDGE

/TRUE COPY/

P.A. TO JUDGE

tss

J.B. KOSHY & K.HEMA, JJ.

M.F.A.Nos. 774 & 875 of 2002

Dated this the 7th day of November, 2007

Judgment

Koshy,J.

A workman, employed by the appellant in M.F.A.No.774 of 2002 (first opposite party), died during the course of employment. Legal representatives/dependents of the workman filed an application for compensation. The tribunal found that the accident arose during the course of employment and calculated compensation of Rs.2,13,570/- with statutory interest. The appellant in M.F.A.No.774 of 2002 is the employer. She questions the monthly wages assessed as well as the penalty imposed. The Commissioner for Workmen's Compensation has imposed 10% of the compensation as penalty over and above the compensation amount and statutory interest. The Commissioner directed the insurance company to pay the compensation and interest as there was valid coverage of insurance for payment of entitled workmen's compensation liability. But, penalty was ordered to be paid by the employer.

2. Insurance company filed M.F.A. No.875 of 2002 contending that the employer declared the wages of the workman as Rs.35/- per day and monthly income of the deceased was Rs.561.86 and, therefore, its liability is only to pay compensation for the death of the workman who gets monthly income of Rs.561.86. Excess amount should be paid by the employer though it is admitted that there was a valid insurance policy covering the employees' liability under the Workmen's Compensation Act. It produced a copy of the insurance policy Annexure-I and proposal form Annexure-II and letter of the employer before this Court saying that number of employees is six and the total salary was Rs.48,000/-. The letter reads as follows:

> "Please note the employees numbers to be changed to 6 instead of 4, as 3 skilled workers and 3 unskilled workers total 6 members. Average wages for skilled workers Rs.30.00 and unskilled workers Rs.23.33 per day. Then the estimated total wages per annum will come to Rs.48,000.00 instead of Rs.36,000.00.
>
> Do the needful for the enhancement and issue the renewal policy at your earliest convenience."

The above letter is dated 3.12.1992.

3. We shall first consider the calculation of monthly wages by the Commissioner. The Commissioner found that even if minimum wages is calculated, the worker will get more than

Rs.2,000/-. Oral evidence adduced would also show that he used to get more than Rs.2,000/-. But, at the time of accident, that is, on 29.11.1997, maximum amount that can be calculated for the purpose of calculation was Rs.2,000/-. Considering the oral evidence adduced in the case and considering the minimum wages payable to a factory worker in Kerala State during the period, we are of the opinion that fixation of monthly wages by the Commissioner needs no interference.

4. It is an admitted case that there was a valid insurance policy covering the workers with the opposite party. The policy reads as follows:

> "NOW THIS POLICY WITNESSETH that if at any time during the Period of Insurance any employee in the insured's immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the insured in the Business and if the insured shall be liable to pay compensation for such injuries either under the Law (s) set out in the Schedule or at Common Law then subject to the terms exceptions and conditions contained herein or endorsed hereon the Company will indemnify the insured against all sums for which the insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim for such compensation."

It shows that as per the policy conditions the insurance company is liable to pay all amounts payable as per the provisions of the

Workmen's Compensation Act. Therefore, we are of the opinion that direction of the Commissioner fixing the liability of the insurance company to pay compensation and insurance cannot be faulted with. Insurance company and employer relied on clause (6) of the policy which reads as follows:

> "The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid by the insured to employees during each period of insurance. The name of every employee together with the amount of wages salary and other earnings shall be properly recorded and the insured shall at all times allow the Company to inspect such records and supply the Company with a correct account of all such wages salaries and other earnings paid during any period of insurance within one month from the expiry date of such period of insurance. <u>If the amount so paid shall differ from the amount on which premium has been paid the differences in premium shall be met by a further proportionate</u> payment to the company or by a refund by the company as the case may be."

Workmen's Compensation policy was also taken by the employer years ago. But, it was a continuing policy, but, every year wages may increase. Number of employees also may vary. Depending upon that, the amount of contribution also was changing and that was taken into account at the time of renewal and letter dated 3.12.1992 shows that, at that time, there was revision of wages and increase in the number of employees. Therefore, they have offered

to pay higher amount on the basis of the renewal notice. But, that wages mentioned is in 1992. Here, the accident occurred after five years. Contention of the insurance company that in the policy issued estimated wages was Rs.48,000/- for six employees and annual income of a single employee is Rs.8,000/- and insurance company has only proportionate liability. It is the contention of the employer that workmen's compensation liability was insured. Periodical contributions were changed. According to the increase in wages and number of employees, letter dated 3.12.1992 cannot be based as their declaration in 1997. But, schedule to the policy only mention estimated wages and not actual wages. In any event, considering the terms of the policy, we are of the opinion that insurance company has undertaken to indemnify the entire workmen's compensation liability as per the Act. Clause (6) of the Policy conditions makes very clear that if excess amounts than that was declared were paid as wages, right of the insurance company is to recover the excess premium in respect of the excess wages paid. Therefore, insurance company has got a right to demand

proportionate increase in premium if the wages declared was not correct. But, the insurance company is to pay the entire workmen's compensation liability. Clause (6) of the policy conditions makes the matter very clear and if the claimant has not declared the full wages and paid premium on a lesser amount, insurance company is free to get higher contribution and to indemnify the liability in view of the terms of the contract. It is well settled law that if there is any dispute in regard to the terms of the insurance policy or ambiguity in the terms of the insurance that has to be interpreted in favour of the insured and against the insurance company as the company drafted to standard form of contract. Once the insurance is admitted, limitation of liability shall be proved by the insurance company. Apart from the above, here, there is no controversy in the wording of clause (6). If excess wages are paid, insurance company is free to demand proportionate excess premium, but, the workmen's compensation liability has to be indemnified by the insurance company. Parties are bound by the terms of the contract. In the above circumstances, award of the Commissioner for Workmen's Compensation directing to deposit the compensation and statutory interest as per the Workmen's Compensation Act needs no interference. Insurance company is free to demand excess premium as per the contract.

5. With regard to the penalty, we are of the opinion that it is for the employer to pay the same, but, on the facts of the case, the employer has informed the matter to the insurance company and payment was delayed only because insurance company denied the liability. But, amount was really deposited before the court within the statutory time for filing the appeal. There is no deliberate intention to evade payment and, therefore, direction to pay penalty in this case is set aside. The amount deposited as compensation and interest can be disbursed to the claimants in accordance with law.

J.B.KOSHY
JUDGE

K. HEMA
JUDGE

vaa

J.B. KOSHY AND
K.HEMA,JJ.

M.F.A. Nos.774 & 875/2002

Judgment

Dated:7th November, 2007